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M. H. [Signature]

NOTE ON THE UNITED STATES NAVAL STATION AT
GUANTANAMO BAY

I. History

1. The establishment of the United States naval station at Guantanamo Bay appears to have been part of the settlement which resulted in Cuban independence at the beginning of the present century. A Cuban revolt against Spain broke out in 1895, and the United States became embroiled in the struggle against Spain in February 1898. By the Treaty of Paris of 10 December 1898 Spain relinquished its rights over Cuba. This was followed by three years of United States military occupation until the proclamation of the Cuban Constitution on 20 May 1902. By an Act approved on 2 March 1901, the United States Congress laid down certain principles defining "the future relations of the United States with Cuba." Article VII thereof provided as follows:

"That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the Government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States."

Other principles limited Cuba's future treaty making powers, its capacity to incur public debts, and conferred on the United States the right to intervene in Cuba in certain circumstances. All the principles embodied in the Act of Congress were included in an annex to the Cuban Constitution. These were also included in a Treaty of Relations between the United States and Cuba, signed at Havana on 22 May 1903.

2. In order to implement Article VII of the above-mentioned Act of Congress, the United States and Cuba concluded two Agreements in the course of 1903 on the "Lease of Coaling or Naval Stations." The first of these was signed in February 1903. The preamble thereof recites that the United States and Cuba are "desirous to execute fully the provisions of Article VII of the Act of Congress approved March second, 1901, and of Article VII of the Appendix to the Constitution of the Republic of Cuba ..." It then proceeds to give the full text of that Article, and states that "to that end"

(i.e. implementation of Article VII) the parties have reached an Agreement. Article I of that Agreement lays down that:

"The Republic of Cuba hereby leases to the United States, for the time required for the purposes of coaling and naval stations, the following described areas of land and water situated in the Island of Cuba ..."

It goes on to define inter alia the area of the Guantanamo naval station. Article II defines certain rights of the United States over the land and water adjacent to "the grant" contained in Article I. Article III, which is the last article, reads, in part, as follows:

"While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas..."

The Agreement contains no provisions either limiting its duration (beyond the qualification in Article I that the lease is "for the time required for the purposes of coaling and naval stations"), or providing for its amendment or denunciation.

3. The second Agreement on the "Lease of Coaling or Naval Stations" was concluded subsequent to the one just described, and came into force upon the exchange of instruments of ratification on 6 October 1903. This Agreement defines certain of the "conditions of the lease" referred to in the first Agreement. Article I provides for an annual payment by the United States to Cuba "of two thousand dollars, in gold coin of the United States, as long as the former shall occupy and use the said areas of land..."

Article II provides for the proper demarcation of the leased areas. Articles III, IV, V, and VI regulate such matters as commercial undertakings in the leased areas; procedures for surrendering fugitives from justice; customs and harbour fees etc. As with the earlier Agreement, no provisions are included regarding duration, amendment or denunciation.

4. The above two Agreements concluded in 1903 appear to provide the present legal basis for the United States claim to the naval station at Guantanamo Bay. They do not seem to have been amended by any other formal arrangements, although, in his Annual

Message to the United States Congress in December 1912, President Taft made reference to an understanding whereby the United States had agreed to release certain land at Bahia Honda, also leased in the first Agreement of 1903, in return for an enlargement of the Guantanamo Bay naval station.

5. While the Agreements of 1903 on the "Lease of Coaling or Naval Stations" appear to have remained without any major alteration since they were concluded, some of the other international engagements to which they have an historical connection have been substantially changed. The Treaty of Relations of 22 May 1903, referred to in paragraph 1 above and embodying the full text of principles of the Act of Congress of 2 March 1901, was abrogated in 1934, and replaced by a new Treaty which in effect abolished certain of those principles which had limited the treaty making power of Cuba, placed restrictions upon its capacity to contract public debts, and given the United States the right to intervene in Cuba in certain circumstances. The Treaty of Relations of 1934 nonetheless maintained, in its Article III, the principle relating to the leasing of coaling or naval stations in the following terms:

"Until the two contracting parties agree to modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23rd day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantanamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantanamo. So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty."

6. In paragraph 1 above it was indicated that the principles contained in the Act of Congress of 2 March 1901 were embodied in an annex to the Cuban Constitution promulgated in May 1902. A new Constitution was adopted by Cuba in 1940, which does not appear to have embodied any of the principles. The Constitution of 1940 has now been replaced by a new one of 17 February 1959 which likewise does not contain any of

the principles.

II. Comments

7. Briefly speaking, it may be surmised that the United States would seek to defend its legal claim to the Guantanamo naval station on the basis of the two Agreements of 1903 described in paragraphs 2 and 3 above and of Article III of the Treaty of Relations of 1934 which re-affirms those Agreements. It could maintain that the Agreements of 1903 make no provision for unilateral denunciation and that the Treaty of 1934 envisages a change in those Agreements only by way of negotiation at agreement between the two parties. Furthermore, it may also point out that the Treaty of 1934 does not provide for unilateral denunciation, that it has not been replaced by any subsequent treaty, and that it therefore also remains in force. The United States would thus be relying upon a fundamental principle of international law, often expressed in the maxim pacta sunt servanda, namely that States must abide by their treaty obligations.

8. On the other hand, it may be surmised that Cuba would seek to argue that the Agreements of 1903 belong to a category of "unequal treaties" as they were in fact imposed upon Cuba as one of the conditions for its independence. Furthermore, this argument might continue, even while this in itself would be sufficient to vitiate the Agreements, they could also be considered invalid on the basis of the change of circumstances which has taken place since 1903. The Act of Congress of 2 March 1901, from which the Agreements derived, advanced inter alia as a basis for establishing the naval station the maintenance of the independence of Cuba and the protection of the people thereof. In present circumstances, it could be argued, there is not only no longer any need for such protection but, on the contrary, by its very existence, given the attitude of the United States towards Cuba, the station constitutes a threat to the independence of Cuba. Finally, Cuba might seek to argue that by seeking to establish what was in fact a perpetual lease of Cuban territory to another State, the Agreements of 1903 were no longer consonant with the present state of international

law and the current conceptions of sovereignty and independence. In other words, Cuba would be invoking one of the grounds recognized by many authorities on international law for the dissolution or expiration of treaties, which is expressed in the maxim rebus sic stantibus, namely that all treaties are concluded on the implied condition that their validity is conditioned by a continuation of the circumstances which gave rise to them and that a vital change of circumstances renders them invalid.

9. It would be beyond the scope of the present note to seek to evaluate in any detail the respective legal merits of the two positions outlined above. The possible United States position would appear to rest upon one of the fundamental concepts of traditional international law, but it does not perhaps give full weight to the history of the question and the changes which have taken place both in international law and in relations between the United States and Cuba since 1903. The possible Cuban position, on the other hand, might be considered to stress the history of the question and changed conditions at the expense of legal considerations. The doctrine of rebus sic stantibus, because it is so easily open to abuse as a means of not fulfilling unwelcome treaty obligations, is confined by most authorities to the narrowest bounds, such as impossibility of performance or the fact that the treaty concerned imperils the existence or vital development of one of the parties. It is also often maintained that this doctrine does not automatically release a State from its treaty obligations, but entitles it to claim such release from the other party or parties. If the other party or parties refuse to accede to the request—particularly if this is accompanied by an offer to submit the issue to judicial determination—then the requesting State may be justified in declaring it no longer considers itself bound by the treaty. In any event, from the practical point of view and legal considerations apart, for as long as the United States continues to occupy the Guantanamo Bay naval station, a peaceful adjustment or settlement can only be reached by negotiation

when the atmosphere would be conducive to such negotiation.

10. A situation somewhat similar to the present one arose in 1947, when Egypt submitted to the Security Council a complaint concerning, inter alia, the stationing of United Kingdom troops in Egypt. In the course of the Council consideration of this item the representative of Egypt argued that the Anglo-Egyptian Treaty of 1936, under which United Kingdom troops were stationed in his country, was no longer valid as it had been concluded in special circumstances, namely the impending outbreak of the Second World War, which no longer existed. Furthermore, it had been imposed upon Egypt. He also argued that the maintenance of foreign troops in Egypt was contrary to the sovereign equality of nations and the system of collective security established by the Charter. Therefore the Treaty of 1936 was inconsistent with the Charter. Under Article 103 of the Charter, the latter's provisions must prevail in cases of conflict with other international obligations. In reply the representative of the United Kingdom stated that the Treaty of 1936 had still a specified number of years to run, that the United Kingdom was prepared at any time to enter into negotiations for its revision, and that Egypt had failed to make out a case in view of its duty to settle disputes in accordance with international law and having in mind the principle pacta sunt servanda. The legal position espoused by Egypt appears to have been expressly supported only by the representatives of Poland and of the USSR. The remaining Members of the Council, on the other hand, sought to stress that a solution to the problem should be reached through direct negotiations between Egypt and the United Kingdom. Three resolutions to this effect were introduced into the Council but, apparently because of differences over their wording and Egyptian objection to direct negotiations, none of them succeeded in obtaining the necessary majority. It may be surmised that if Cuba were to bring a complaint to the Council, in the present circumstances, against the maintenance of the United States naval station at Guantanamo Bay similar arguments would be advanced, and the majority of the Council might again propose a negotiated settlement.

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